

EX PARTE OR LATE FILED

EX PARTE
03-128

RECEIVED

SEP 30 2004

September 20, 2004

ORIGINAL

In reply refer to:
Federal Communications Commission R&C#: 04090085
Office of the Secretary

Ms. Nancy Schamu, Executive Director
National Conference of State Historic Preservation Officers
Suite 342 - Hall of the States
444 North Capitol Street, NW
Washington, D.C. 20001-1512

RE: FCC/ACHP/NCSHPO - DRAFT NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF
EFFECTS ON HISTORIC PROPERTIES FOR UNDERTAKINGS APPROVED BY THE FEDERAL
COMMUNICATIONS COMMISSION

Dear Ms. Schamu,

We are sending this letter in response to your September 10, 2004 Memorandum regarding the Programmatic Agreement (PA) that has been adopted by the Federal Communication Commission (FCC) and is currently under review by the Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO). The draft provided to us was circulated among the Iowa State Historic Preservation Office (SHPO) staff for review and comment. And while we applaud the signatories for their steadfast efforts to resolve what has proven to be a very difficult topic, we are disappointed to find that the product of these labors falls far short of our expectations.

The Iowa SHPO regrets to inform you that we cannot endorse execution of this agreement in its present state for the following reasons.

1. We find that the document is long, complex, convoluted, and not particularly user-friendly.
2. The consultative procedures established under the PA *would not* stream line the SHPO consultation process but will in fact result in protracted SHPO reviews and consultation. As you are probably aware, Iowa was one of the many states, which, in lieu of formal guidance from the FCC or ACHP, acted early to provide written guidance to the cellular telecommunications industry on how to best meet their section 106 compliance obligations when building in Iowa. The Iowa SHPO issued its first Guidance Memorandum on March 20, 2000, then issued a revised and expanded version on April 30, 2001 to take into account revisions to the ACHP's rules in January of 2001 and the execution of the FCC's Nationwide Programmatic agreement for collocations in March 2001. SHPO staff, in preparing this document, remained cognizant of industry needs for timeliness. While not perfect the Iowa SHPO's Memo was welcomed by project proponents because it established consistent and tangible standards where none had existed before. It outlined the information that SHPO staff would require to complete their reviews in a timely fashion.

For the most part Iowa's system has been successful in meeting the industry's need for timeliness. Our records show that in 1999 the Iowa SHPO received 117 letters from FCC applicants and provided 101 written responses. Average turn around was 47 days. In 2000, the numbers increased to 422 letters received and 376 responses issued in an average time of 17 days. The numbers continue to increase in 2001 with 727 letters received and 754 responses issued in an average of 22 days. As the telecommunications build across Iowa slowed in 2002 the numbers declined with 196 letters received and 205 letters issued in an average of 21 days. In 2003, we received 206 letters and responded with 208 letters in an average of 11 days. This year, SHPO's turn around has dropped to an average of 10 days with 107 letters received and 106 responses sent.

Stipulation VII.A.3 states 'If the SHPO/THPO receives a comment or objection, in accordance with Section V.E, more than 25 but less than 31 days following its receipt of the initial submission, the SHPO/THPO shall have five

No. of Copies rec'd 2
List ABOVE

calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the commission.' If SHPO receives a comment from the public after it has already issued its review letter will the SHPO be allowed to reconsider its position? Under these conditions the SHPO, even though it may have completed its review in well under the 30-days, is now compelled to wait until the end of the 30-day comment period to issue its comments in order to avoid issuing multiple comment letters. SHPO consultation is prolonged further if the project submittal is not sufficient for SHPO to begin its review. At this point the applicant is thrown into a second round of consultation which will last another 30 days (VII.A.4). We foresee SHPO consultation involving multiple and unnecessary rounds of correspondence extending well beyond the averages achieved by our office over the last couple of years. This will delay project startup, increase the amount of paperwork, and overtax SHPO's limited resources.

3. The PA allows for the replacement of existing telecommunication towers without review unless the new tower is substantially bigger. It does not allow for the possibility of historic telecommunications towers being replaced, nor does it specify whether "replacement" could mean new construction adjacent to an existing tower, which would be dismantled as soon as the new tower is up. It only discusses within the same lease area. There are also concerns that this exclusion does not take into account any archaeological sites that were not identified prior to the original construction or that were identified, avoided or partially mitigated, and so were not adversely effected by original construction. A tower constructed at [REDACTED] lends itself as a perfect example of the potential risks in assuming that these undertakings categorically pose no threats to historic properties. In this case, the construction of the original tower had destroyed the majority of a prehistoric mound. Had it remained undetected, it is possible that future facility expansion enabled under this agreement would not only have jeopardized what remained of the first mound but also a second mound nearby. Moreover, the PA does not address the potential for adverse effects to cultural landscapes, traditional cultural properties, or sacred sites under this categorical exclusion. Existing, unresolved adverse effects, such as those upon the [REDACTED] [REDACTED], would be perpetuated under this stipulation.
4. Page B-14 of the agreement (stipulation I) states "Although the Commission will strive to protect the privacy interests of all parties, the Commission cannot guarantee its own ability or the ability of Applicants to protect confidential, private, and sensitive information from disclosure under all circumstances." The FCC's lack of assurance in this area will certainly undermine future consultation with Tribal Governments and will dampen its efforts to establish trusting, working relationships with the Indian people. Furthermore, in our opinion this disclaimer introduces a fatal flaw into the Commission's Tower Notification System, which on its face, relies heavily on the input of information by the Indian people. It has been our experience that Indian people and the Tribes to which they belong are not likely to volunteer any information pertaining to sacred or religious sites even under normal circumstances much less without the strict observance of confidentiality.
5. The PA prejudices Tribal consultation by placing over-reliance upon digital communication systems and electronic formats that may not be accessible to all Tribal Governments and individuals.
6. Section VI.D.1.a requires the applicant to consider only those properties listed in SHPO/THPO Inventory that the SHPO/THPO has previously evaluated and found to meet the National Register criteria and that are identified accordingly in the SHPO/THPO Inventory. Section VI.D.1.e states that applicants are not required to evaluate the historic significance of properties identified pursuant to VI.D.1.a but may rely on the previous evaluation of these properties. This assumes that the information in the SHPO's Inventory is accurate, complete, and current. It also allows the applicant to place over reliance on potentially outdated or erroneous information or survey results that were achieved under methods and techniques that might not be consistent with current standards. Furthermore, the Applicant is now obligated to visit the SHPO office in order to consult the inventory files. We fail to see how this will save time or money. We project that this approach will lead to numerous adverse effects upon unidentified historic properties, especially those in rural areas. In Iowa, while we have over 110,000 properties in our site inventory, fewer than 90,000 of those have ever been preliminarily evaluated, much less formally evaluated by a professional in recent years, with concurrence by SHPO.

7. The PA employs vague or ambiguous language in places, which calls for subjective interpretation on the part of the reader. For instance, item c.i on page B-20 mentions that the applicant is not required to undertake a Field Survey for archaeological resources where the depth of *previous disturbance* exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least 2 feet below the proposed construction depth. What constitutes *previous disturbance*? There are many archaeological sites in the State of Iowa that have been previously disturbed that, nonetheless, are listed in or eligible for listing in the National Register. These include individual mounds, mound groups, cemeteries, open habitation sites, procurement sites, villages, and ridged field systems to name only a few. Clarification is required here to distinguish disturbance that has not entirely compromised integrity and significance from profound disturbance that has removed all possibility of National Register consideration. Item X.A mentions that complaints must be in writing and supported by *substantial* evidence. What constitutes substantial evidence?
8. Item d on page B-20 implies that only intact archaeological sites qualify for National Register. Integrity is but one consideration when determining eligibility; here it is presented as the sole qualifier. A site's significance within its historic context must be taken into consideration here. In Iowa, an early Paleoindian site typically will be recommended as eligible for the National Register regardless of its stratigraphic integrity.
9. The process for determining the need for an archaeological field survey as outlined on pages B-20 and B-21 will lengthen the SHPO consultation process to at least 60 days depending on the archaeologist's findings. In Iowa, most carriers prefer to conduct survey up front to expedite the SHPO review process.
10. Stipulation E-4 discounts the cumulative effects that multiple collocations may have upon historic properties.
11. Stipulation E.5 on page B-22 requires that assessment pursuant to this Agreement shall be performed by professionals who meet the Secretary of the Interior's Professional Qualification Standards. Does this statement include assessments of effects on non-archaeological resources? If not then it should be made clear.
12. According to Items B.1, B.2, C.1 and C.3, the closure of the Section 106 process is dependent upon the action or inaction of the SHPO. In our opinion this is not consistent with intent of 36 CFR 800.2 and in particular it neglects tribal sovereignty and disregards the unique status of Indian Tribes in the section 106 process. The actions or inaction of the SHPO should not be used to foreclose the opportunity of other parties to consult.
13. Item IX.D. requires that if an Applicant in the course of construction discovers any human or burial remains during implementation of an undertaking, the Applicant shall cease work immediately, notify the SHPO/THPO and Commission, and adhere to applicable State and Federal laws regarding the treatment of human or burial remains. The Iowa SHPO has no legal jurisdiction over the treatment of human remains. This statement should be revised to refer Applicants to the appropriate legal authorities.
14. Item C.2. (page B-27) allows for the FCC to 'request a response to a complaint' from the Applicant within a 'reasonable time.' Why do not the same rigid timeframes established for the SHPO and other consulting parties apply to the Applicants? In our opinion this whole section will allow the FCC and their non-compliant applicants to string out section 110(k) situations indefinitely. Iowa SHPO has witnessed firsthand the ineffectiveness of this approach during consultation with the FCC on the [REDACTED] tower. To date the mitigation of effects at [REDACTED] and resolution of the FCC's non-compliance remain outstanding.
15. At what point is a 'probable violation' determined to be an actual violation? This is not explained.
16. According to section XI of the PA the commission shall notify any objector of the outcome of its action. What is the timeframe? Given the FCC's record of past performance, this could take years.

These are the main points raised by my staff and I sincerely hope that the members of the NCSHPO Board will take them into consideration before next Tuesday's vote in Louisville. Once again, we commend NCSHPO, FCC, and the Advisory Council in their diligence; but feel that we must recommend that they reconsider ratifying this agreement until some significant revisions have been made.

I can be reached at (515) 281-3306, Tuesday through Thursday, if you wish to discuss this further.

Sincerely,

Lowell J. Soike
Deputy State Historic Preservation Officer
State Historical Society of Iowa

Cc: Charlene Dwin Vaughn, Advisory Council on Historic Preservation
Dan Abeyta, Senior Legal Counsel, FCC
Amos Loveday, Cultural Preservation Specialist, FCC
Representatives of Indian Tribes with Interests in Iowa